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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 367

MARJORIE R. SKAHILL, as Administratrix of the Estate of JOHN J. SKAHILL, deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC. and UNITED AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CAPITAL AIRLINES, INC. and UNITED AIRLINES, INC.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Marjorie R. Skahill, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the case of Marjorie R. Skahill, as administratrix of the estate of John J. Skahill, deceased, v. Capital Airlines, Inc. and United Airlines, Inc., on April 20, 1965.

Opinions Below

The opinion of the District Court (R. 164), printed in Appendix A hereto at pages 1a-5a, is reported in 234 F. Supp. 906. The United States Circuit Court of Appeals for the Second Circuit affirmed the District Court judgment without formal opinion on April 20, 1965.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 20, 1965. R. Vol. II, p. 26a. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Is the refusal to apply the New York public policy (which prohibits the imposition of foreign death action recovery limitations on the grounds that they are "absurd" and "unjust") to an action involving a non-domiciliary of New York, while allowing the application in a case involving a domiciliary of New York, violative of the United States Constitution—Amendment XIV, Section 1; Amendment V; Article IV, Section 2?

2. Is the application of the public policy of a state dependent upon domicile and/or contacts within the state?

Statutes, Constitutional Provisions Involved

1. Virginia Code, Section 8-636:

"Sec. 8-636 Amount and Distribution of Damages.—The jury in any such action may award such damages as to it may seem fair and just, not exceeding thirty thousand dollars, and may direct in what proportions they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased . . . (Code 1919, 5787; 1920, p. 27; 1942, p. 337; 1952, c. 60; 1958, c. 387.)"

2. The Constitution of the State of New York, Art. I, section 16:

"Sec. 16 DAMAGES FOR INJURIES CAUSING DEATH.—

The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

3. United States Constitution, Amendment XIV, section 1:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

4. United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

5. United States Constitution, Article IV, section 2:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . ."

Statement of the Case

Petitioner's decedent, Commander John J. Skahill, U.S.N., died as a result of a crash of a Capital Airlines Viscount Aircraft near Charles City, Virginia, on January 18, 1960. Commander Skahill, on active duty with the United States Navy, was a passenger for hire on said

aircraft. At the time of his death, the decedent, his widow and three minor children were citizens and domiciliaries of Massachusetts, but were residents of London, England, where the decedent was stationed pursuant to his naval duties. The Petitioner, the decedent's widow, was duly qualified and appointed as Administratrix by the Probate Court, Norfolk County, Massachusetts, on February 18, 1960. Subsequent to her appointment, and before the commencement of this suit, the Petitioner and her children moved to Rhode Island where they became, and still are, domiciled.

At the time of the accident, defendant, Capital Airlines, Inc., was a Delaware corporation doing business within the State of New York, but doing no business in Massachusetts or Rhode Island. Subsequent to the accident and before the commencement of this action, Capital Airlines merged with the defendant United Airlines, Inc., also a Delaware corporation doing business in New York, and the liabilities of Capital were assumed by United.

This action was commenced on December 15, 1961, in the United States District Court for the Southern District of New York. Jurisdiction was based upon diversity of citizenship and the requisite monetary amount. The complaint (R. 178) alleges three causes of action: the first, for wrongful death pursuant to the Virginia wrongful death statute; the second, for loss of accumulation to decedent's estate; the third, for conscious pain and suffering. The Virginia wrongful death statute limits recovery to no more than $30,000. (*supra* p. 2).

On June 30, 1964, defendants moved for an order, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment in favor of the defendants: (a) dismissing the first cause of action insofar as

it seeks damages in excess of the Virginia statutory limitation of $30,000.; (b) dismissing the second cause of action; (c) dismissing the third cause of action (R. 187-192). At the same time, defendants further moved for an order, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings in favor of the plaintiff for $30,000. on the first cause of action (R. 187-192). The plaintiff did not contest the defendants' motion for dismissal of the second and third causes of action.

The motions came to be heard before the Honorable Richard H. Levet, United States District Judge, on September 15, 1964. In an opinion dated October 20, 1964 (R. 164; Appendix A, 1a), the defendants' motions for summary judgment and judgment on the pleadings were granted. On October 28, 1964, judgment was entered in favor of the plaintiff for $30,000. (R. 171). The plaintiff filed a notice of appeal on November 25, 1964. The United States Circuit Court of Appeals for the Second Circuit affirmed the District Court judgment without formal opinion on April 20, 1965 (R. Vol. II, p. 26a; Appendix B).

The District Court opinion (R. 164; Appendix A, 1a), affirmed by the Court of Appeals, declared that the New York courts have stated that limitations on recoveries in wrongful death actions were contrary to its public policy and would not be enforced, at least as to residents of New York, although other parts of the foreign death statute were enforced. It was also held that the residence of the dependents of a decedent was a significant factor justifying the imposition of the New York public policy and that since neither the decedent nor his dependents were residents of New York that New York's contacts or interests were insufficient to justify the imposition of New York's public policy relating to death action damages.

Reasons for Granting the Writ

1. In *Kilberg* v. *Northeast Airlines,* 9 N. Y. 2d 34, an action for wrongful death of a New York domiciliary in a Massachusetts airplane accident, the State of New York Court of Appeals stated:

> "since both Massachusetts . . . and New York . . . authorize wrongful death suits against common carriers, the only controversy is as to the amount of damages recoverable, New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old . . .
>
> . . . We will still require plaintiff to sue on the Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damages."

The State of New York Court of Appeals subsequently indicated distinctly and definitely that the principles stated in *Kilberg* reflect the law of New York. See *Davenport* v. *Webb,* 230 N. Y. S. 2d 17, 19, wherein, referring to the *Kilberg* case, the Court declared:

> "We there indicated that the Courts of this State were free to award damages in excess of the amount limited by a foreign death statute under which the action was brought since 'New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old' . . .
>
> . . . Recognizing 'The absurdity and injustice' (id., p. 40, 211 N. Y. S. 2d 136, 172 N. E. 528) of such limitations, we announced that we would no longer recognize them. . . ."

The public policy as enunciated in *Kilberg* and *Davenport* was predicated upon the realization that limitations on death action damages were not only "absurd" but *"unjust."* Judge Desmond, in the *Kilberg* decision, referred to limitations of death action damages and stated that "the absurdity and injustice has become increasingly apparent." Likewise, Judge Kaufman, in his dissenting opinion, *Pearson* v. *Northeast Airlines, Inc.*, 307 F. 2d 131, alluded to the *Kilberg* case:

> "The opinion suggested that in 66 years since the New York Constitution was written the absurdity and injustice of fixed limitations enacted in other States had become 'increasingly apparent.'"

The decision below is believed to be erroneous. It holds that the imposition of the New York public policy (which is predicated upon justice) is dependent upon residence, or more specifically, upon contacts. It is respectfully suggested that the decision fails to differentiate between the concept of public policy and that of significant contacts. It is conceded, as pointed out in paragraph six of the decision, that residence is a factor indicative of significant contacts which is a proper basis for making a choice of law. *Richards* v. *United States*, 369 U. S. 1, 15, 12 N. 26 (1962). In a significant contacts case, the contacts justify the superposition of the law of a particular state; but such is not the case when dealing with a public policy matter. Public policy arises on its own merit to preserve "fundamental principles of justice, prevalent conceptions of good morals, or a deep-rooted tradition of the common weal." *Mertz* v. *Mertz*, 271 N. Y. 466. The justification for the imposition of a public policy is the policy itself; it acts independently of contacts. See *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514.

2. A vital question of constitutional rights of a whole class of non-domiciliaries of New York is involved here. The New York State Court of Appeals has decreed that foreign death action recovery limitations are "unjust," and consequently, will not, as a matter of public policy, enforce them. Since the public policy was applied to a case involving a domiciliary of New York (i.e., *Kilberg* case, *supra*) to prevent injustice, then it must be applied to cases involving non-domiciliaries as well. Justice, being the basis of the public policy concerned, cannot be extended to one group and withheld from another. How can it be said that it is unjust to apply the death actions recovery limitation to a domiciliary of New York (i.e., *Kilberg* case, *supra*) and just to apply it to a non-domiciliary?

The opinion below contends, and rightfully, that under the Equal Protection Clause and the Privileges and Immunities Clause of the Constitution, *supra,* p. 3, reasonable classifications are permitted which may result in different treatment for different groups. However, in a matter where justice is the issue, a classification which permits justice for one and withholds it from the other is unreasonable. Treatment predicated upon justice must be uniform because of the very nature of justice. Justice is a fundamental right and privilege of the citizens of each of the states. To exercise the privilege of justice in favor of the citizens of one state and deny it to the citizens of another is hostile to fundamental rights, disturbs equal administration of justice and contravenes the United States Constitution—Amendment XIV, Section 1; Amendment V; and Article IV, Section 2, *supra,* p. 3.

3. Clearly, the question presented is of importance in the administration of justice. Settlement of the question

by this Court is plainly in the public interest since it is likely to arise in every case in New York involving a foreign wrongful death statute recovery limitation. The development of law emanating from the *Kilberg* decision is embryonic, yet the decisions resulting therefrom already denote the need for clarification. In *Gore* v. *Northeast Airlines, Inc.*, 222 F. Supp. 50 (S. D. N. Y. 1963), the decedent was a New York domiciliary who was killed in a crash which occurred in Massachusetts, on a flight from New York to Massachusetts. At the time of the decedent's death, his wife and two of his children were domiciled in New York. Before the commencement of the action, the widow and children moved to Maryland. The Court held that the Massachusetts recovery limitation would apply because the dependents of the decedent were not domiciliaries of New York at the time of the commencement of the action, even though they were domiciliaries at the time of the decedent's death. The implication of the decision is that a foreign domiciliary should move into New York prior to the commencement of suit. What, also, of a situation where some of the dependents of a decedent remain domiciled in New York throughout and others move out?

4. The decision of the Court below in the instant case conflicts, in principle at least, with applicable decisions of this Court. In *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, the public policy of Pennsylvania was involved in an action brought under the Alabama wrongful death statutes without regard to the domicile of the parties or the existence of contacts.

In addition, the dictates expressed in *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), would require the Federal Courts sitting in New York to apply the conflict

of laws doctrine of New York to cases where jurisdiction is based upon diversity of citizenship. The *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34 (1961) and the *Davenport* v. *Webb*, 11 N. Y. 2d 392 (1962) cases held the conflict of laws doctrine of New York to be that foreign death action recovery limitations were unjust and that public policy prohibited their imposition. The Court below, in the instant case, failed to apply the law of New York.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Levet, *D.J.*

LEVET, *D.J.*

This is a motion for summary judgment by defendant in an action for (1) wrongful death; (2) loss of accumulations to decedent's estate; and (3) pain and suffering allegedly sustained by decedent.

The relief requested is limitation of the damages recoverable on the first claim to $30,000 and dismissal of the

latter two claims, all based on Virginia statutes. Predicated on success in its motion with respect to the first claim, defendant also moves for judgment on the pleadings in the amount of $30,000 in favor of *plaintiff*. There is no genuine issue as to any material fact necessary to decide the motion for summary judgment. Plaintiff does not oppose the defendant's request for relief with regard to the latter two claims.

The action arose out of the crash of a Capital Airlines airplane in Virginia on a flight between Washington Airport, Virginia and Norfolk, Virginia. Plaintiff's decedent was a passenger and was killed in the crash. At the time of the accident decedent, his widow and three minor children were all domiciled in Massachusetts. At the time of the commencement of this action decedent's widow and his three minor children were residents of Rhode Island. They continue to reside in Rhode Island. Subsequent to the crash Capital merged with United Air Lines which assumed Capital's liabilities.

Jurisdiction here is based on diversity of citizenship and the requisite monetary amount. This court must apply the law of New York, including its conflict of laws doctrine. Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487 (1941). Wrongful death actions are statutory and New York law refers to the law of the place of the wrong, Virginia. Kilberg v. Northeast Airlines, 9 N. Y. 2d 34, 38 (1961). The Virginia wrongful death statute limits recovery to no more than $30,000.

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It is settled that a state may refuse to apply the law of a sister state where it violates the public policy of the forum state. Pearson v. Northeast Airlines, Inc., 307 F. 2d 131, 138-39 (2d Cir.) (dissenting opinion), subsequently adopted by majority, 309 F. 2d 553, 556 (1962), cert. denied, 372 U. S. 912 (1963); see Wells v. Simonds Abrasive Co., 345 U. S. 514 (1953). The New York courts have stated that limitations on recoveries in wrongful death actions were contrary to its public policy and would not be enforced, at least as to residents of New York, although other parts of a foreign wrongful death statute were enforced. Kilberg v. Northeast Airlines, Inc., supra. The public policy was stated thus: "For our own courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts Law." Id. at 40.

The New York Court of Appeals pointed to residents of New York as the natural objects of New York's public policy. The Second Circuit has emphasized the residence of dependents of the deceased in New York as a significant factor justifying the imposition of New York public policy.

Pearson v. Northeast Airlines, Inc., supra. To the same effect is Gore v. Northeast Airlines, Inc., 222 F. Supp. 50, 53 (S. D. N. Y. 1963). These factors are indicative of New York's contacts with or interest in the transaction, Pearson v. Northeast Airlines, Inc., supra at 141-42, which

is a proper basis for making a choice of law, Richards v. United States, 369 U. S. 1, 15, 12 n. 26 (1962).

The question for decision here is whether New York's contacts or interests are sufficient to justify the superposition of the New York damage policy on the Virginia statute. The answer must be in the negative. Neither the decedent nor his dependents were residents of New York at any relevant time. Further, New York's concern for users of its transportation facilities is of no help because the flight did not touch New York. Babcock v. Jackson, 12 N. Y. 2d 473, 480 (1963).

Plaintiff has asserted that it would be a constitutional denial if the New York public policy was not invoked to eliminate the Virginia limitation merely because non-domiciliaries were involved. The Due Process, Full Faith and Credit, Equal Protection and Privileges and Immunities Clauses are advanced as support of this contention. The Full Faith and Credit and Due Process Clauses are the more familiar of the constitutional limitations in a conflict of laws context. It seems fairly clear that a state court's choice of law will be upset under these provisions only when the state whose law is applied has no legitimate interest in its application. Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 1, 75-6 (1958); Richards v. United States, supra at 15. This court's choice of Vir-

ginia law will not, therefore, violate these two clauses —168— since, as the place of the injury and the takeoff and terminus state, Virginia has sufficient contact with and interest in the litigation.

Similarly, no unconstitutionality can be predicated on the Equal Protection or Privileges and Immunities Clauses. The strangeness of these provisions to conflict of laws discussions requires somewhat greater length in their treatment here. Equal Protection permits reasonable classifications which may result in different treatment for different groups. Morey v. Doud, 354 U. S. 457, 463-64 (1957). "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public * * *. Indeed, the very idea of classification is that of inequality * * *." Atchison, Topeka & Santa Fe R.R. v. Matthews, 174 U. S. 96, 106 (1899).

As reasonable inequalities are permitted under the Equal Protection Clause, so they are also permitted under the Privileges and Immunities Clause. This provision protects "the right of a citizen of one state * * * to institute and maintain actions of any kind in the courts of another." Corfield v. Coryell, 4 Wash. C. C. 371, 380 (1823). However, it is satisfied if access to the courts of a state are "upon terms which in themselves are reasonable and adequate for the enforcing of any rights he [a non-resident] may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." Canadian Northern Ry. v. Eggen, 252 U. S. 553, 562 (1920).

I conclude that the classification here, based on contacts with or interest in the transaction from which the litigation arose and incidentally resulting in the dissimilar treatment of residents and non-residents of the forum state is reasonable under both the Equal Protection and Privileges and Immunities criteria.

The motion for summary judgment is thus granted in all respects. The Virginia damages limitation will prevail in the wrongful death action and the other claims are dismissed. Since the defendant has moved for judgment on the pleadings in favor of plaintiff in the amount of the maximum permissible recovery, $30,000, that motion is also granted.

Settle order on notice.

Dated: New York, N. Y.
October 20, 1964.

RICHARD H. LEVET
United States District Judge

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Order and Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants having moved this Court for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment in favor of the defendants (a) dismissing the first cause of action alleged in the complaint insofar as it seeks damages in excess of $30,000, (b) dismissing the second cause of action alleged in the complaint, and (c) dismissing the third cause of action alleged in the complaint, all upon the grounds that there is no genuine issue as to any material fact and that defendants are entitled to such summary judgment as a matter of law, and defendants having further moved this Court for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings in favor of the plaintiff in the sum of $30,000 on the first cause of action alleged in the complaint, together with the costs of the action, upon the ground that said sum is the maximum amount that the plaintiff can recover as a matter of law, and said motions having come on regularly to be heard before the Honorable Richard H. Levet, United States District Judge, on the 15th day of September, 1964,

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Now, upon reading and filing the defendants' notice of motion dated June 30, 1964, and the affidavit of William J. Junkerman, sworn to the 29th day of June, 1964, in

support of the motion for summary judgment, and the undated affidavit of Raymond V. Rebecchi, in opposition thereto, and plaintiff not having opposed the dismissal of the second and third causes of action in her complaint, and due deliberation having been had thereon and on filing the opinion of the court dated October 20, 1964, it is

On motion of Haight, Gardner, Poor & Havens, attorneys for defendants, Capital Airlines, Inc., and United Air Lines, Inc.,

ORDERED, that defendants' motion for summary judgment in favor of defendants (a) dismissing the first cause of action alleged in the complaint insofar as it seeks damages in excess of $30,000, (b) dismissing the second cause of action alleged in the complaint, and (c) dismissing the third cause of action alleged in the complaint, be and the same hereby is granted, and it is further

ORDERED, that defendants' motion for judgment on the pleadings in favor of the plaintiff in the sum of $30,000 with respect to the remainder of the first cause of action alleged in the complaint, together with the costs of the action, be and the same hereby is granted, and it is further

ORDERED, that judgment be entered herein in favor of the plaintiff for $30,000 together with costs and disbursements in her favor to be taxed by the clerk.

Dated: New York, N. Y.
October , 1964.

RICHARD H. LEVET
U.S.D.J.

APPENDIX B

Order Affirming Judgment of District Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April one thousand nine hundred and sixty-five.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

MAJORIE R. SKAHILL, as Administratrix of the estate of John J. Skahill, Deceased,

Plaintiff-Appellant,

—v.—

CAPITAL AIRLINES INC., and UNITED AIR LINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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—against—

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the district court (App. A of Petition, pp. 1a-5a) is reported at 234 F. Supp. 906. The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court without opinion at the conclusion of oral argument on April 20, 1965; its decision (App. B p. 8a) is not officially reported.

Jurisdiction

The jurisdictional requisites are set forth in the petition at page 2.

Questions Presented

1. Did the courts below properly interpret and apply the New York conflict of laws rule in enforcing a death

damages limitation of the *lex loci delicti* where New York had no contacts with the parties or subject matter of the action?

2. Did the enforcement of such death damages limitation, under the circumstances of this case, violate any provision of the United States Constitution?

Constitutions and Statutes Involved

The pertinent provisions are set forth in the petition at pages 2-3.

Statement of Facts

The facts involved are adequately set forth in the petition at pages 3-5.

ARGUMENT

I.

The Courts below properly interpreted and applied New York law.

The issue presented in this case was whether New York conflict of laws doctrine required the courts below to invoke New York public policy against death damages limitations and to refuse to enforce the death damages limitation of the *lex loci delicti* (Virginia).

The district court (affirmed without opinion by the United States Court of Appeals for the Second Circuit) decided:

1. That since New York concededly had no contact whatever with the action, except in its capacity as the forum, New York would not invoke its public policy, and would enforce the Virginia damages limitation; and

2. That the enforcement of the limitation in a case having no connection whatever with New York raised no constitutional problems.

The first part of the decision was a simple determination by the courts below of what the New York conflict of laws rule is—a determination which the lower courts were required to make under *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

This Court has stated many times that " . . . we accept and therefore do not review, save in exceptional cases, the considered determinations of questions of state law by the intermediate federal appellate courts . . ." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).

This is not the "exceptional case" that the court should review. The petitioner seems to argue that the New York courts would apply the doctrine of *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961), and would refuse to enforce the Virginia death damages limitation because New York applies its public policy regardless of whether or not it has any contact with the parties or the issues of the case.

This is clearly wrong. In the *Kilberg* case, the New York Court of Appeals was careful to emphasize that it was giving effect to New York public policy only because the decedent was a New York domiciliary, and the rationale of the decision was based upon the Court's concern to ". . . provide protection for our own State's

people." 9 N.Y. 2d at 39. The *Kilberg* rule was specifically limited "to our own domiciliaries. . . ." 9 N.Y. 2d at 40.

The case of *Davenport* v. *Webb*, 11 N.Y. 2d 392, 183 N.E. 2d 902 (1962), is mis-cited by the petitioner as supporting the proposition that the New York courts will not enforce foreign death limitations in any case. The question in *Davenport* was whether, in a case involving a New York resident, New York law or the *lex loci delicti* should govern the addition of prejudgment interest—which New York law allowed, but which Maryland law (*lex loci delicti*) did not. The New York Court of Appeals held that on that issue the *lex loci* governed, and prejudgment interest was not allowed.

Petitioner's contention that the New York courts, in cases involving "public policy", do not consider New York's interest in or contacts with the issues, is demolished by recent decisions of the New York Court of Appeals. Thus in *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 480, 191 N.E. 2d 279 (1963), the Court of Appeals noted that:

> "Although the *Kilberg* case did not expressly adopt the 'center of gravity' theory, its weighing of the contacts or interests of respective jurisdictions to determine their bearing on the issue of the extent of the recovery is consistent with that approach."

Most recently the same court stated that: "In *Kilberg, supra*, the court emphasized the significant contacts which New York State had with the case." *Dym* v. *Gordon*, 16 N.Y. 2d 120, 126, — N.E. 2d — (1965). In that case a New York domiciliary injured in an automobile accident in Colorado sued the driver of the car in which he was riding, who was also a New York domiciliary. Colorado has a so-called "guest statute" which would prevent recovery. New York has no such statute, and in fact has what the Court described as a "policy of compensation for innocent tort victims." The precise question was whether the

policy of New York or of Colorado should prevail. The majority examined the interests of the two states and came to the conclusion that Colorado's interest was predominant, that Colorado law and policy should be applied, and that New York law and policy must yield. The dissenters felt that New York's contacts were predominant; even they did not suggest the application of New York public policy in the absence of any New York contacts whatever.

Petitioner's distorted interpretation of *Mertz* v. *Mertz*, 271 N.Y. 466, 3 N.E. 2d 597 (1936), adds no support to her argument. In *Mertz*, the issue was whether a wife could sue her husband in New York for personal injuries arising out of a tort committed in Connecticut, which permitted such suits between spouses. New York law denied the right of a wife to sue her husband under such circumstances. The Court of Appeals held that since the husband and wife both resided in and were married in New York, New York law applied. In the more recent case of *Intercontinental Hotels Corp.* v. *Golden*, 15 N.Y. 2d 9, 16, 203 N.E. 2d 210 (1964), the Court of Appeals characterized *Mertz* as a precursor of its "significant contacts" rule for choosing the law applicable to actions for torts occurring outside New York. From an examination of these cases, it is clear that New York applies its public policy *only* where it has some interest in or contacts with the case. The courts below in the instant case therefore correctly applied New York law.

Indeed New York could not constitutionally apply its public policy to refuse to enforce the Virginia limitation. In establishing broad guidelines for the States in choice of law matters, this Court has said, in *Richards* v. *United States*, 369 U.S. 1, 15 (1962):

> "Where more than one State *has sufficiently substantial contact with the activity in question*, the forum

> State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another State *having such an interest* in the multistate activity." [Emphasis added.]

This constitutional requirement that there be a substantial connection between the forum state and the subject matter or parties to the action as a prerequisite to the choice of the forum state's law or public policy was stated without qualification in Judge Kaufman's opinion in the *en banc* decision in *Pearson* v. *Northeast Airlines, Inc.*, 309 F. 2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), a case in which the *Kilberg* doctrine was applied to a New York resident representing a New York decedent who took off on a flight from New York (309 F. 2d at 563):

> ". . . In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out-of-state event. . . ."

Thus, not only does New York not apply its public policy to cases such as this, in which it has no interest, but it *could not* constitutionally apply that public policy in such cases.

II.

There is no conflict of decisions.

The petitioner asserts that the decision of the court below ". . . conflicts, in principle at least, with applicable decisions of this Court." (Petition, p. 9), citing *Klaxon Co.* v. *Stentor Electric Mfg. Co., supra,* and *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953).

The *Klaxon* case, of course, laid down only the principle

that federal courts sitting in diversity cases must apply the conflict of laws rules of the states in which they sit. That is precisely what the courts below did in this case: they applied the conflict of laws rule of New York as they interpreted it. As noted above, their interpretation was clearly correct.

The *Wells* case is also totally distinguishable and offers no support to the petitioner's position. *Wells* held that, while Pennsylvania must apply the substantive law of Alabama (*lex loci delicti*), it is not required by the Full Faith and Credit Clause of the federal constitution to apply features of the foreign law (e.g., statute of limitations) which have been traditionally regarded as procedural, despite subtle distinctions which would perhaps classify some statutes of limitations as substantive. No question of public policy was raised in that case, and there was no discussion of the requirement of the Due Process Clause that contacts exist between the forum state and the subject matter of the action before the public policy of the forum state may constitutionally be applied to an out-of-state cause of action. But in fact, as authorities in the field have pointed out, the forum state in *Wells* did have a substantial interest in the issue:

> "Pennsylvania, as the forum and the principal place of business of the defendant corporation, had a double interest in the application of its shorter limitation period: (1) an interest in safeguarding its judicial processes against claims and evidence rendered unreliable by the passage of time and (2) an interest in safeguarding local people and enterprises against stale claims founded on such unreliable evidence." Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 71 (1958).

New York has no contacts with or interest in the subject matter or parties in this action.

The petitioner does not claim that the decision below conflicts with decisions in any other circuit, and since it simply involves a question of New York law, such a conflict would rarely arise. But certainly other circuits have had no hesitation in applying foreign death limitations even where the policy of the forum state was strongly opposed to such limitations, and even where the forum state had substantial contacts with the action. *Goranson* v. *Capital Airlines, Inc.*, 345 F. 2d 750 (6th Cir. 1965) (involving the same accident as the instant case). And in *Tramontana* v. *S. A. Emprese de Viacao Aerea Rio Grandense*, — F. 2d — (D. C. Cir. June 10, 1965—not yet reported), 33 L.W. 2666, the United States Court of Appeals for the District of Columbia applied a Brazilian death damages limitation to a case involving a Maryland resident and arising out of an airplane accident in Brazil, because the District of Columbia had no contact with the issues, despite the District of Columbia's policy against death damage limitations.

The unanimity of the federal courts clearly demonstrates the lack of substance to the petitioner's arguments.

III.

No important constitutional issue or federal question is presented here.

The petitioner apparently claims that if New York (as in the *Kilberg* case) refuses to enforce a foreign death limitation in a case involving a New York domiciliary, the constitution compels it to refuse to enforce such a limitation in any case brought in its courts, regardless of whether New York has any connection with the issues.

The short answer to this contention is that, as this Court said in *Wells* v. *Simonds Abrasive Co., supra,* (345 U.S. at 516) the constitution ". . . does not compel a state to adopt any particular set of rules of conflict of laws", except that (as this Court clearly implied in *Richards* v. *United States, supra*), the constitution forbids a state to apply its own laws or policy to a case with which it has no contacts. Far from compelling New York to apply its public policy to this case, therefore, the constitution clearly forbids it to do so.

Petitioner's position is the extraordinary one that a plaintiff has the privilege of imposing upon a defendant that concept of "justice" which is most favorable to her, simply by choosing a forum whose concepts of justice coincide with her own, regardless of whether or not that forum has any interest in the action. In effect, she claims that forum-shopping is entitled to constitutional protection, a patently absurd proposition.

The petitioner's proposed rule, by which federal courts sitting in New York would apply New York public policy regardless of whether New York domiciliaries were involved or whether New York had any "contacts", would result in uninhibited forum-shopping which would be much worse than that which existed before *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938), when *Swift* v. *Tyson,* 41 U.S. (16 Pet.) 1 (1842), was the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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